

## CHAPTER Env-WC 200 PROCEDURAL RULES

Statutory Authority: RSA 21-O:14, IV; RSA 541-A:16, I

### PART Env-WC 201 PURPOSE AND APPLICABILITY

Env-WC 201.01 Purpose. The purpose of these rules is to set forth the general procedures that will be used in the proceedings of the New Hampshire water council. The rules relative to conducting adjudicatory proceedings are established for the purpose of acquiring sufficient information to make fair and reasoned decisions on matters within the council's statutory jurisdiction, and shall be construed to secure the just, efficient, and accurate resolution of council proceedings in accordance with recognized principles of due process and the requirements of RSA 541-A.

Env-WC 201.02 Applicability.

- (a) The provisions of Env-WC 202 shall apply to all proceedings of the council.
- (b) The provisions of Env-WC 203 and Env-WC 204 shall apply to all appeals allowed by law to be taken to the council, other than the following matters, since they are not allowed by law to be appealed to the council:
  - (1) Pursuant to RSA 21-O:14, I, any decision pertaining to rulemaking undertaken by the department or declaratory rulings issued by the department as provided for in RSA 541-A;
  - (2) Pursuant to RSA 485-A:40, any approvals of plans or specifications pursuant to RSA 485-A:29-44, "Sewage Disposal Systems";
  - (3) Pursuant to RSA 485-A:50, VIII, any annual assessments levied against a municipality pursuant to RSA 485-A:50; and
  - (4) Pursuant to RSA 21-O:5-a, department decisions made pursuant to RSA 482-A.

### PART Env-WC 202 GENERAL PROCEDURES

Env-WC 202.01 Place of Meetings.

- (a) All regular meetings of the council shall be held at the department's offices in Concord.
- (b) Special meeting, including meetings held to inform the public or solicit public comments, shall be held in Concord or such other place as the council shall determine based on consideration of maximizing access of interested persons to the meeting.

Env-WC 202.02 Notice of Meetings. Notice of council meetings shall be publicized as required by RSA 91-A. The notice shall contain the time, date, and place of the meeting and the scheduled agenda for the meeting. The council clerk shall maintain a record demonstrating that all statutory notice requirements have been met.

Env-WC 202.03 Record of Meetings. A record of all regular and special meetings of the council shall be made by tape recording or other method that provides a verbatim record. Minutes of the meeting shall be prepared by the council clerk and distributed to the council members.

Env-WC 202.04 Presiding Officer.

- (a) The presiding officer at a meeting shall be the chairman of the council if present and willing to preside. If the chairman is unavailable for any reason, the presiding officer shall be the vice-chairman, if available, or a member of the council selected by those members present at the hearing.
- (b) The presiding officer at a meeting shall regulate the course of the meeting and take such other action that is necessary for the efficient and orderly conduct of the meeting, consistent with these rules and any other applicable state law.

Env-WC 202.05 Computation of Time.

- (a) All time periods established or otherwise referenced in these rules shall be calendar days unless otherwise specified.
- (b) Computation of any period of time established or otherwise referred to in these rules shall begin with the first day after the triggering act or event and end at the department's close of business on the last day of the period.
- (c) For time periods established in these rules, if the last day of the period falls on a Saturday, Sunday, or state legal holiday, then the time shall be extended to include the first business day following the Saturday, Sunday, or state legal holiday.

Env-WC 202.06 Filing of Documents.

- (a) Any correspondence filed with the council other than correspondence relating to an appeal shall be filed by mailing or delivering the original to the following address:

Water Council  
c/o DES, Water Division  
29 Hazen Drive  
PO Box 95  
Concord, NH 03302-0095

- (b) Any document required or allowed by these rules to be filed in conjunction with an appeal shall be filed by mailing or delivering the original and 20 copies of the document to the appeals clerk at the following address:

Water Council  
Attn: Appeals Clerk  
c/o DES Legal Unit  
29 Hazen Drive  
P.O. Box 95  
Concord, NH 03302-0095

- (c) The original and one copy of any document filed that relates to an appeal shall be printed only on one side of the page and not stapled or otherwise permanently bound. The remaining 19 copies of such documents may be double-sided and stapled.

(d) For purposes of this section, “filed by mailing or delivering in-hand” includes delivery by private delivery service but excludes submittals by telefacsimile (fax) or by electronic mail (e-mail).

Env-WC 202.07 Signatures.

(a) Every document filed with the council that is not related to an appeal shall be signed by the individual submitting the document or, if the document is filed on behalf of an entity, by a duly-authorized representative of the entity.

(b) Every document filed with the council that relates to an appeal, including any notice of appeal, motion, petition, brief, memorandum, or other document, but not including exhibits submitted at a hearing, shall be signed by the participant who files the document or by the representative of that participant who has filed an appearance in accordance with Env-WC 203.06.

(c) The signature on a document filed with the council shall constitute a certification that:

- (1) The signer has read the document;
- (2) The signer is authorized to file it;
- (3) To the best of the signer’s knowledge, information, and belief, there are good grounds to support it; and
- (4) The document has not been filed for purposes of delay or harassment.

Env-WC 202.08 Address Updates.

(a) Any participant in an appeal and any person who has filed a motion for reconsideration shall maintain a current mailing address and daytime telephone number and, if available, a fax number and e-mail address, on file with the appeals clerk until completion of the matter.

(b) For purposes of this section, “completion of the matter” means the later of:

- (1) The expiration of the time period allowed by law for appealing the subject decision, if no appeal is filed within that time; or
- (2) The date of the final decision on the last appeal taken.

Env-WC 202.09 Issuance or Filing of Documents.

(a) All orders, decisions, notices, or other written correspondence or documents issued by or at the direction of the council shall be deemed to have been issued on the date noted on the document.

(b) All written correspondence or documents issued by or at the direction of the council that are sent by first class mail, postage prepaid, to the addressee’s last address of record shall be presumed to have been received by the addressee.

(c) All written documents not relating to an appeal that are filed in accordance with Env-WC 202.06(a), shall be deemed to have been received by the council on the actual date of receipt by the council clerk.

(d) All written documents relating to an appeal that are filed in accordance with Env-WC 202.06(b) shall be deemed to have been received by the council on the actual date of receipt by the appeals clerk.

Env-WC 202.10 Communications with the Council.

(a) All communications with the council shall be filed in accordance with Env-WC 202.06 and shall identify the name and address of the communicator and the subject matter of the communication.

(b) No person shall submit any documents or exhibits or otherwise communicate any information that pertains either directly or indirectly to the subject matter of a pending appeal directly to any member of the council, other than at a hearing or prehearing conference for which all participants have been given notice in accordance with these rules.

(c) Any member of the council who receives any direct communication from any person that pertains directly or indirectly to the subject matter of a pending appeal shall, at the next council meeting, inform the council on the record of the communication and submit a copy of the same, or, if the communication was made orally, relate the substance of the communication to the council on the record.

(d) No information shall be considered as evidence or made part of the record of an appeal before the council unless the information is introduced as evidence in accordance with Env-WC 204.

Env-WC 202.11 Presentations to the Council.

(a) Any person may request the opportunity to present information to the council.

(b) If made in advance of a council meeting, the request shall be filed in writing in accordance with Env-WC 202.06.

(c) If made at a council meeting, the request may be made in writing or orally on the record.

(d) The request shall include:

- (1) The name of the individual who wishes to present the information;
- (2) The name of the person represented by the individual, if any;
- (3) The subject of the information; and
- (4) The length of time needed to present the information.

(e) The council shall allow the individual to present the information if the council determines that:

- (1) The information does not relate to a matter that is the subject of a pending appeal or for which the time in which to file an appeal has not expired;
  - (2) The information relates to a subject over which the council has statutory jurisdiction;
- and

(3) Allowing the information to be presented will not unduly prolong or otherwise unreasonably interfere with the conduct of the meeting.

(f) If the council grants the request to provide information, the council shall inform the individual of the date and time at which the information can be presented.

Env-WC 202.12 Recess and Adjournment. The council shall, from time to time, recess or adjourn any meeting as might be necessary to the orderly conduct of the meeting on its own initiative or at the request of:

- (a) Any person scheduled to present information as part of the council's general proceedings; or
- (b) Any participant in an appeal.

Env-WC 202.13 Waiver of Rules.

(a) Any person may request the council to waive, for good cause, the application of any of these rules not mandated or required by any New Hampshire statute.

(b) Requests made in an appeal proceeding shall be made and processed as a motion in accordance with Env-WC 203.13.

(c) All other requests made in advance of a meeting shall be in writing. Requests made at a meeting may be made orally on the record. All requests shall state the basis for the request.

(d) The council shall grant the request if it determines that:

- (1) The requirement is not mandated by statute;
- (2) Good cause for the waiver exists; and
- (3) No person objects to the waiver or, if a person does object, the reason(s) for granting the waiver outweigh the reason(s) for denying the waiver.

(e) For purposes of this section, good cause shall be determined with reference to the specific rule for which a waiver is sought. In determining whether good cause exists to waive a rule, the council shall consider whether strict adherence to the rule will cause hardship and whether waiving the rule will prejudice the interests of any participant in an appeal or be detrimental to the public interest.

#### PART Env-WC 203 APPEALS: FILING; NOTICE; PARTICIPANTS AND REPRESENTATIVES; SCHEDULING; MOTIONS

Env-WC 203.01 Appealing a Decision to the Council. Any person wishing to appeal a department decision allowed by law to be appealed to the council shall file a notice of appeal as specified in Env-WC 203.02 within 30 days of the date the decision being appealed was issued, as evidenced by the date on the decision.

Env-WC 203.02 Notice of Appeal.

- (a) A notice of appeal shall include the following:

- (1) For each appellant, the appellant's full legal name, mailing address, and daytime telephone number and, if available, a fax number and e-mail address;
  - (2) If the notice of appeal is being filed by the appellant's representative, the representative's name, mailing address, and daytime telephone number and, if available, a fax number and e-mail address;
  - (3) If the notice of appeal is being filed by a group of appellants, the group representative's name, mailing address, and daytime telephone number and, if available, a fax number and e-mail address;
  - (4) A clear and concise statement of the relief sought and the statutory provision under which the relief is sought;
  - (5) A clear and concise statement of the facts upon which the council is expected to rely in granting relief;
  - (6) A clear and concise statement as to why the appellant has standing to bring the appeal that shows why the appellant will suffer a direct and adverse affect or injury in fact as a result of the decision being appealed in a way that is actual and imminent and is particularized to the appellant and that is more than any impact of the decision on the general public. If the appellant is a group, its statement shall include information showing that at least one of its members possesses standing; and
  - (7) A copy of the decision or order that is being appealed.
- (b) A notice of appeal may also include such other information as the appellant deems pertinent and relevant, including attachments of exhibits, illustrations, and sworn written testimony.
- (c) The appellant shall provide a copy of the notice of appeal to the director and to the commissioner of the department.
- (d) If the appeal relates to the issuance of a permit and the appellant is not the permit holder, the appellant shall serve a copy of the notice of appeal on the permit holder in accordance with Env-WC 203.08.
- (e) If the appeal relates to the issuance or denial of a permit and the statute or rules under which the permit was issued or denied require the applicant to provide direct notification of the permit application to any person, the appellant shall serve a copy of the notice of appeal on all persons required by the program rules to receive such direct notice.

Env-WC 203.03 Determination of Sufficiency of Notice of Appeal.

- (a) Upon receipt of a document filed as a notice of appeal, the appeals clerk shall assign a docket number to the document and review the document for compliance with the requirements of Env-WC 203.01 and Env-WC 203.02(a).
- (b) If the document appears to comply with the requirements of Env-WC 203.01 and Env-WC 203.02(a), the appeals clerk shall distribute a copy of the notice of appeal to the council.
- (c) If the document was not filed within the time limit established by Env-WC 203.01, the

appeals clerk shall distribute a copy of the document to the council with a statement that the appeal was not timely filed.

(d) If the document was timely filed but does not appear to comply with the requirements of Env-WC 203.02(a), the appeals clerk shall:

(1) Send a written notice to the person who filed the document to inform the person that:

- a. The document does not meet the requirements of Env-WC 203.02(a); and
- b. If the person wishes to pursue the appeal, the person has 30 days in which to file a document that meets the requirements of Env-WC 203.02(a); and

(2) Provide a copy of the written notice and the document to the council.

(d) After the expiration of the 30-day period, the appeals clerk shall:

- (1) Provide the council with a copy of any document received from the person; or
- (2) If no document was received, so inform the council at the first council meeting following the end of the 30-day period.

Env-WC 203.04 Identification of Documents. Subsequent to the filing of a notice of appeal, the docket number assigned by the appeals clerk pursuant to Env-WC 203.03(a) shall be used by all participants to identify all correspondence and other documents submitted to the council relating to the appeal, including any written testimony or exhibits used at a hearing.

Env-WC 203.05 Intervenors.

(a) A request to intervene in an appeal shall be filed in accordance with RSA 541-A:32, I and Env-WC 202.06(b).

(b) The council shall consider and grant or deny all petitions for intervenor status in accordance with the provisions of RSA 541-A:32.

(c) The order issued pursuant to RSA 541-A:32, V shall specify the extent to which the intervenor shall participate in the proceeding.

(d) Once granted leave to intervene, an intervenor shall take the proceeding as he or she finds it and no portion of the proceeding shall be repeated because of the fact of intervention.

Env-WC 203.06 Representation and Appearances.

(a) Any participant in an appeal before the council may be represented by an attorney licensed to practice law in New Hampshire or such other individual as the participant may designate. This provision shall not be construed to permit the unauthorized practice of law as defined by the New Hampshire supreme court or the New Hampshire general court.

(b) Each participant's representative shall file an appearance with the appeals clerk that identifies the participant being represented and the representative's name, mailing address, and daytime telephone

number and, if available, a fax number and e-mail address. If the original notice of appeal was filed by the representative and includes the information specified by this paragraph, a separate appearance shall not be required.

(c) All representatives shall obtain and become familiar with these procedural rules prior to appearing before the council.

(d) For each appeal, the department shall designate a representative for purposes of that appeal. The designated representative shall file an appearance pursuant to (b), above.

(e) Each participant and representative shall update the contact information filed pursuant to this section as necessary to reflect current information.

#### Env-WC 203.07 Removal of Representatives.

(a) Upon making a finding of misconduct on the part of any representative appearing before the council, the council shall prohibit that individual from acting as a representative before the council for the pending matter.

(b) For purposes of this section, misconduct means:

- (1) Behavior that is disruptive to the orderly conduct of the appeal; or
- (2) A consistent or recurring failure to:
  - a. Meet deadlines;
  - b. Comply with the provisions of Env-WC 200; or
  - c. Provide information that has been requested by the council or by other participants, unless the representative believes in good faith that the information is protected by law from disclosure.

(c) Prior to making a finding of misconduct so as to warrant the imposition of such prohibition, the council shall:

- (1) Inform the representative, the participant represented by the representative, and all other participants and their representatives, if any, to the proceeding of the proposed prohibition; and
- (2) Provide an opportunity for the representative, the participant represented by the representative, and all other participants and their representatives, if any, to the proceeding to address the council regarding why the prohibition should or should not be imposed.

#### Env-WC 203.08 Service List; Service of Documents.

(a) For each appeal, the appeals clerk shall maintain a service list that identifies:

- (1) Each participant or, if the participant is represented and the representative filed the notice of appeal or has otherwise filed an appearance, the participant's representative;
- (2) Each person who has filed a motion to intervene that has not yet been ruled on by the



council; and

(3) The mailing address, daytime telephone number, and, if available, fax number and e-mail address of each person identified in (1) and (2), above.

(b) The appeals clerk shall provide a copy of the service list to any person upon request.

(c) Any person who files an appeal-related document with the council other than documents or exhibits filed at a hearing or prehearing conference shall serve a copy of the document on each person identified on the service list.

(d) Service shall be made:

(1) As specified in (g), below;

(2) On or before the date of filing of the original document with the appeals clerk; and

(3) On the representative of a participant for whom a representative has filed an appearance, provided however that timely service inadvertently made on a participant for whom a representative has filed an appearance shall be sufficient regardless of whether the participant's representative also was served.

(e) Except for exhibits distributed at a prehearing conference or hearing, every document required to be served upon the participants in an appeal shall be accompanied by a certificate of service, signed by the person making service, attesting to the method and date of service and the person(s) served.

(f) If time is of the essence in a filing and service will be made by mail, the person filing the document shall send a copy of the document by fax or e-mail to all other participants for whom a fax number or e-mail address is available, and shall notify any participant for whom a fax number or e-mail address is not available of the filing by telephone.

(g) Delivery of documents pursuant to this section shall be by:

(1) Delivery in hand to the recipient or, if the recipient is unavailable, to the recipient's representative, in which case the person delivering the document shall sign a statement indicating the date and time of delivery and the identify of the person receiving the document;

(2) First class mail to the recipient, postage prepaid, in which case a certificate of mailing shall be obtained by the person sending the document;

(3) Certified mail to the recipient, return receipt requested;

(4) Unites States Postal Service express delivery service to the recipient; or

(5) Private express delivery service, such as Federal Express® or UPS®, to the recipient.

#### Env-WC 203.09 Scheduling of Appeal Hearing.

(a) The council shall schedule an appeal hearing no later than the second regularly scheduled council meeting following receipt by the council of a complete notice of appeal that complies with Env-WC 203.02(a).

(b) Once a hearing has been scheduled, the appeals clerk shall send written notice of the date, time, and place of the hearing to the participants or, as applicable, their representatives, and to all other persons who have filed an appearance with the appeals clerk. The notice shall include all information required by RSA 541-A: 31, III, including but not limited to a statement that the hearing is to consider the issues raised in the notice of appeal, a statement of the legal authority under which the hearing is to be held, and a reference to the particular statute(s), rule(s), or permit(s), as applicable, involved in the appeal.

(c) If the hearing is rescheduled, the appeals clerk shall send a notice of the date, time, and place of the rescheduled hearing to the participants or their representatives, as applicable.

Env-WC 203.10 Calendar of Hearings. The appeals clerk shall maintain a record of all appeals pending before the council.

Env-WC 203.11 Extensions of Time.

(a) Any participant in an appeal may petition the council to extend any time limit established by Env-WC 200 in accordance with this section.

(b) Prior to filing an extension request, the participant shall seek concurrence with the request from all other participants in the appeal.

(c) A request for an extension shall be in writing and filed in accordance with Env-WC 202.06(b) at least 10 business days prior to the expiration of the prescribed period.

(d) The request shall state the reason(s) for the extension request and whether the other participants in the appeal agree or disagree with the request or did not respond to the request for concurrence.

(e) A copy of the request shall also be served in accordance with Env-WC 203.08. If the request is filed within 20 days of the expiration of the prescribed period, the person filing the request shall implement the procedure specified in Env-WC 203.08(f).

(f) Any participant who did not concur with the request may object to the request by filing a written objection with the council within 5 business days of receipt of the request, stating the reasons why the request should not be granted.

(g) The council shall grant the request if the council determines that the delay will not prejudice the interests of any participant in the appeal and:

(1) Meeting the prescribed time limit would unduly burden the participant; or

(2) An extension is otherwise necessary to conduct a more effective hearing.

(h) The council shall, in a timely manner, make a decision with respect to the request for extension and notify all participants in writing of its decision.

Env-WC 203.12 Continuances.

(a) Any participant may request that a hearing conducted pursuant to this part be continued for reasonable cause and reconvened or rescheduled.

(b) Prior to filing a request for a continuance of a hearing made in advance of the hearing, the participant seeking the continuance shall seek concurrence with the request from all other participants in the appeal.

(c) A request made in advance of the hearing shall:

- (1) Be in writing;
- (2) State the reason(s) for the request;
- (3) Be filed at least 5 business days prior to the scheduled hearing date; and
- (4) State whether the other participants to the appeal agree or disagree with the request or did not respond to the request for concurrence.

(d) A request for a continuance made at a hearing may be made orally provided it is entered in the record of the hearing.

(e) The council shall grant the request if the council determines that reasonable cause exists and that no other participant will be prejudiced by the delay. For purposes of this section, reasonable cause shall include, but not be limited to:

- (1) Unavailability of an individual participant, a representative, or critical witness;
- (2) The participants believe that an informal resolution is possible and need more time to resolve the matter; or
- (3) The participants are awaiting information, reports, data, or a related court decision that is material to the appeal.

(f) The council shall deny the request if the council determines that the request is not supported by reasonable cause. Grounds for determining that the request is not supported by reasonable cause include, but are not limited to:

- (1) An individual participant, representative, or critical witness is chronically unavailable;
- (2) No progress towards a settlement has been demonstrated by the participants; or
- (3) There have been repeated or unreasonable delays in obtaining information, reports, data, or a related court decision that is material to the appeal.

(g) All orders for continuance shall specify the time and place at which such hearing shall be reconvened. The presiding officer shall notify the participants and the public, if applicable, in such a manner as is appropriate to ensure that reasonable notice shall be given of the time and place of such continued hearing.

#### Env-WC 203.13 Motions and Objections Thereto.

(a) Any participant may file a written motion or make an oral motion in accordance with this section.

(b) Prior to filing a written motion, the participant shall seek concurrence with the relief requested in the motion from all other participants in the appeal, provided however that if the motion would result in a ruling that is adverse to another participant's interests, the moving participant does not need to seek concurrence from that participant.

(c) All motions shall:

- (1) Contain a clear and concise statement of the facts and law that support the motion;
- (2) State the specific relief or ruling requested;
- (3) State whether the other participants in the appeal agree or disagree with the motion or did not respond to the request for concurrence; and
- (4) If filed in writing, be signed as required by Env-WC 202.07.

(d) The participant who makes the motion shall have the burden of persuasion on all matters raised in the motion and the overall burden of persuading the council to grant the motion.

(e) If the need for a motion does not become apparent until after the hearing has started, a participant may make an oral motion. An oral motion shall be recorded in full on the tape recording of the hearing.

(f) All participants who would be adversely affected by the ruling sought in a motion shall have an opportunity to respond to the motion. For a written motion, responses shall be in writing and shall be filed no later than 5 days after receipt of the motion. For an oral motion, responses shall be made during the hearing at which the oral motion was made unless the presiding officer determines, based on the nature of the motion, that it is appropriate to grant additional time to prepare a response to the motion.

(g) An objection to the motion shall clearly and concisely state:

- (1) The action which the party filing the objection wants the council to take on the motion; and
- (2) Any facts and law relied upon in opposition to the motion.

(h) Repetitious motions shall not be submitted.

Env-WC 203.14 Withdrawal of Appeal.

(a) The appellant may withdraw the appeal at any time prior to a final decision being made by the council.

(b) To withdraw the appeal, the appellant shall submit a written notice of withdrawal to the appeals clerk stating that the appeal is being withdrawn. If the appeal was resolved by a settlement, the appellant shall attach a copy of the settlement to the notice of withdrawal.

Env-WC 203.15 Presiding Officer.

- (a) The presiding officer for an appeal shall be the chairman of the council or a member of the council designated by the chairman.
- (b) The presiding officer shall:
  - (1) Rule on issues of evidence;
  - (2) Regulate the course of the proceeding;
  - (3) Rule upon issues of procedures;
  - (4) Administer oaths or affirmations; and
  - (5) Take such other action that is necessary for the efficient and orderly conduct of the proceeding, consistent with these rules and any other applicable state law.
- (c) Exceptions to rulings of the presiding officer in an appeal shall be considered to have been preserved if a contemporaneous oral or written objection is:
  - (1) Made on the record of the appeal; and
  - (2) Included in a motion for rehearing.

Env-WC 203.16 Withdrawal of Presiding Officer.

- (a) Any participant may request the presiding officer to withdraw from an appeal for good cause.
- (b) A request for the presiding officer to withdraw shall be in the form of a motion that is filed and handled in accordance with Env-WC 203.13.
- (c) For purposes of this section, good cause for withdrawal shall be that the presiding officer has an objectively-demonstrated bias for or against one or more of the participants. Good cause shall not include that the council member serving as the presiding officer was appointed to the council to represent a particular interest group or state agency.
- (d) The participant requesting the withdrawal of the presiding officer shall support the request with sworn testimony or other evidence submitted with the motion.
- (e) For purposes of this section, an “objectively-demonstrated bias” means that the participant requesting the presiding officer to withdraw submits evidence that shows, by a preponderance of the evidence, that the presiding officer has had personal dealings with the project under appeal or a participant in the proceeding that would cause a reasonable person to believe that as a result of the dealings, the presiding officer will discount or ignore evidence and law to find in favor of or against the participant.

Env-WC 203.17 Recusal of Council Members.

- (a) Any participant may request a council member to recuse himself or herself from hearing the appeal for good cause.

(b) A request for recusal of a council member shall be in the form of a motion that is filed and handled in accordance with Env-WC 203.13.

(c) For purposes of this section, good cause for recusal shall be that the council member has an objectively-demonstrated bias for or against one or more of the participants. Good cause shall not include that the council member was appointed to the council to represent a particular interest group or state agency.

(d) The participant requesting the recusal of the council member shall support the request with sworn testimony or other evidence submitted with the motion.

(e) For purposes of this section, an “objectively-demonstrated bias” means that the participant requesting the recusal of the council member submits evidence that shows, by a preponderance of the evidence, that the council member has had personal dealings with the project under appeal or a participant in the proceeding that would cause a reasonable person to believe that as a result of the dealings, the council member will discount or ignore evidence and law to find in favor of or against the participant.

## PART Env-WC 204 APPEALS: PREHEARINGS; HEARINGS

### Env-WC 204.01 Settlement Discussions; Prehearing Conferences.

(a) After receiving a notice of appeal, the department’s designated representative shall contact the appellant and all other participants in the appeal to offer the opportunity to meet to determine whether the matter can be resolved without the need for a formal hearing. If the participants meet and agree to a resolution of the matter, then the appellant shall withdraw the appeal in accordance with Env-WC 203.14.

(b) If the participants agree to meet but a meeting cannot be scheduled prior to the council meeting for which the hearing has been scheduled, the department’s representative shall inform the appeals clerk and the hearing shall be rescheduled for the following council meeting.

(c) Nothing herein shall preclude any participant or the council from requesting a prehearing conference in accordance with RSA 541-A:31, V, in lieu of or in addition to a meeting scheduled or held pursuant to (a), above.

Env-WC 204.02 Supplemental Materials. Unless otherwise agreed at a prehearing conference, memoranda, briefs, and other written materials designed to supplement a notice of appeal shall be filed in accordance with Env-WC 202.06(b) and served in accordance with Env-WC 203.08 at least 10 business days prior to the scheduled hearing on the appeal.

### Env-WC 204.03 Pre-hearing Exchange of Information.

(a) Unless otherwise agreed at a prehearing conference, more than one week prior to the commencement of a hearing the participants shall exchange the following:

- (1) A list identifying each witness expected to be called at the hearing with a brief description of that witness’s testimony;
- (2) A list of all exhibits expected to be presented at the hearing; and

(3) Any requests for changes to or waivers of the standard procedures as specified in these rules or other matters concerning the conduct of the hearing.

(b) If a participant wishes to obtain information other than that specified in (a), above, from another participant, the requesting participant shall request the information in writing and shall file a copy of the request with the appeals clerk and serve a copy on the participant from whom the information is sought.

(c) Requests pursuant to (b), above, shall be limited to information directly related to the matter for which the hearing will be conducted.

(d) A participant receiving a request for information pursuant to (b), above, shall respond to the request within 10 days by:

- (1) Providing the information requested;
- (2) Explaining why the information will not be provided; or
- (3) Identifying a date and time when the information can be made available for inspection, which date and time shall be sufficiently in advance of the hearing on the matter that the information can be reasonably reviewed prior to the hearing.

(e) A participant who has received a request for information pursuant to (b), above, may decline to provide information that the participant believes is:

- (1) Confidential;
- (2) Privileged;
- (3) Not directly related to the matter at hand; or
- (4) Excessively burdensome to produce.

(f) If a participant declines to provide information pursuant to (e), above, the explanation provided pursuant to (d)(2), above, shall include a detailed explanation of the reason(s) why the information is not being provided.

(g) A participant who has requested information pursuant to (b), above, that is not provided may request the presiding officer to require the participant of whom the information was requested to provide the information. Such requests shall be in the form of a written motion that is filed and handled in accordance with Env-WC 203.13.

(h) The participant shall file a motion pursuant to (g), above, within 7 days of receiving the denial of the information under (e), above, but no later than 5 days prior to the scheduled hearing. No motion shall be accepted within 5 days before a scheduled hearing unless the presiding officer determines that good cause exists for the late filing. For purposes of this paragraph, "good cause" means that the participant requesting the information did not discover the existence of the information in time to request the information, receive the denial, and file a timely motion and could not have discovered the existence of the information with reasonable diligence.

(i) The presiding officer shall grant a motion filed pursuant to (h), above, if the presiding officer determines that:

- (1) The information is directly related to the matter at hand such that the requesting participant will be materially prejudiced in the case by the lack of the requested information; and
  - (2) The information is not confidential, privileged, or excessively burdensome to produce.
- (j) If the presiding officer grants the motion and the participant asked to provide the information fails or refuses to provide it, the presiding officer shall:
- (1) Delay the hearing until the information is provided;
  - (2) Rule that such information shall not be admissible at the hearing on the matter or in any subsequent proceeding on the matter, unless the information is already a matter of public record; or
  - (3) Refer the matter to the council for a determination of whether the requesting participant cannot reasonably present its case without the requested information. If the council finds that the requesting participant cannot reasonably present its case without the requested information, the council shall find in favor of the requesting participant on the matter(s) sought to be proved by the requested information.
- (k) For purposes of this section, in making a determination of whether it would be excessively burdensome to produce requested records, the presiding officer shall consider:
- (1) The volume of records requested;
  - (2) The amount of time that would be needed to find, organize, and copy the records; and
  - (3) The relevance of the requested records to the subject matter of the appeal.

Env-WC 204.04 Opening the Proceeding. The presiding officer at an appeal hearing or prehearing conference shall open the proceeding by describing in general terms the purpose of the proceeding and the general procedures governing its conduct.

Env-WC 204.05 Hearing Record.

- (a) The record of the hearing shall include:
- (1) The notice(s) of the hearing;
  - (2) The tape recording of the hearing;
  - (3) All exhibits, motions, requests for findings and conclusions, and other written materials submitted by the participants at or for the hearing; and
  - (4) Any other item(s) specified by RSA 541-A:31, VI.
- (b) All testimony shall be recorded. The council, upon request of a participant, shall provide, at cost, a duplicate tape of the hearing. Any person desiring a transcript of the hearing prepared by a qualified stenographer shall provide the stenographer and shall bear all expenses associated with the preparation of the transcript. Any transcript so prepared shall be made available to the council for



copying at the council's expense.

Env-WC 204.06 Testimony.

- (a) All testimony to issues of fact presented by participants and other witnesses shall be made under oath or affirmation.
- (b) Any individual testifying before the council shall state for the record his or her name, address, and if a representative of a participant, the identity of the participant so represented.
- (c) Any individual testifying before the council shall be subject to cross-examination as provided in (f), below.
- (d) Whenever it appears that testimony to be offered at the hearing would be more readily understood if presented in written form, the presiding officer shall require the participant offering such testimony to submit the testimony in written form, provided such requirement will not substantially prejudice the interests of any participant in the hearing. Upon request of the participant who has been requested to submit written testimony, the presiding officer shall direct that the record be held open after the close of the hearing or that the hearing be continued to a later date for the sole purpose of allowing sufficient time to prepare the written submission. All persons offering testimony in written form shall be subject to cross-examination as provided in (f), below.
- (e) Unless otherwise agreed at a prehearing conference, direct testimony shall be offered in the following order:
  - (1) The person who filed the notice of appeal and such witnesses as the person may call;
  - (2) The department and such witnesses as the department may call; and
  - (3) Intervenor(s) and such witnesses as the intervenor(s) may call.
- (f) If the presiding officer, members of the council, or legal counsel to the council have questions regarding a witness's testimony, the individual having the question shall cross-examine a the witness during or at the conclusion of the testimony of that witness, as allowed by the presiding officer. The presiding officer shall allow other participants or their representatives a reasonable opportunity to cross-examine each witness. Cross-examination shall be by asking questions directly of the witness, so long as such direct questioning is not disruptive to the orderly conduct of the hearing. If the presiding officer determines that such cross-examination is disruptive to the orderly conduct of the hearing, then the presiding officer shall require the cross-examination to be conducted indirectly, by addressing questions to the witness through the presiding officer.

Env-WC 204.07 General Evidence.

- (a) Pursuant to RSA 541-A:33, II, the rules of evidence shall not apply.
- (b) Evidence that is relevant and material to the subject matter of the hearing shall be admissible. Evidence that is irrelevant, immaterial, or unduly repetitious shall be excluded. The experience, technical competence, and specialized knowledge of the councilors, if relevant, may be used in the evaluation of all evidence submitted to the council.
- (c) Whenever necessary for a full and fair consideration of the appeal, the presiding officer shall

take official notice of relevant laws, official rules, and transcripts of other hearings, judicially recognizable facts, generally recognized facts of common knowledge to the general public, and physical, technical or scientific facts within the council's specialized knowledge consistent with the requirements of RSA 541-A:33, V. The final decision of the council shall specifically identify those facts of which official notice was taken.

(d) All documents, materials, and objects offered in evidence as exhibits shall be marked by the offering participant with the docket number and shall, if accepted, be numbered or otherwise identified in a sequential manner. Documentary evidence shall be received in the form of copies or excerpts if the original is not readily available. Any person offering any documentary or photographic evidence shall provide each member of the council and each participant with a copy of such documents or photographs, unless such documents or photographs are determined by the presiding officer to be of such form, size or character as not to be reasonably suitable for reproduction.

(e) All written testimony and documents, materials, and objects admitted into evidence shall be made available during the course of the hearing for examination by all participants. Following the hearing, all such evidence shall be available at the department's offices in Concord during normal business hours.

(f) In any proceeding involving an application for a permit or other approval, the application filed with the department, including all supplemental information including but not limited to maps, plans, and specifications, and any amendments to the application or supplemental information, shall be placed into evidence by the department.

(g) All objections to rulings of the presiding officer regarding evidence or procedure and the grounds for the objections shall be timely stated during the course of the hearing. Nothing herein shall be construed as independent authorization for interlocutory appeals of rulings of the presiding officer.

(h) No information shall be considered as evidence or made part of the record in any proceeding before the council that is not introduced as evidence in accordance with this part.

#### Env-WC 204.08 Exhibits.

(a) Where evidence to be presented consists of numerical or graphic data and such evidence would make oral presentation difficult to follow, such evidence shall be presented in exhibit form. Exhibits may be summarized, supplemented, and explained.

(b) Space shall be provided in the upper right hand corner of each exhibit for the insertion of the number of the exhibit and the name of the witness through whom it is presented.

(c) The participant offering an exhibit shall supply the original and 20 copies thereof to the council and shall provide a copy to each other participant, unless exempted under Env-WC 204.07(d).

#### Env-WC 204.09 Requests for Findings and Conclusions.

(a) Any participant may submit requests for findings of fact and conclusions of law by the close of the record, as established under Env-WC 204.10.

(b) If a participant submits requests for findings of fact and conclusions of law, each requested finding or ruling shall be a separately-numbered statement.

Env-WC 204.10 Close of the Record.

(a) After the conclusion of the hearing, no other evidence, testimony or exhibits shall be allowed into the record, except as allowed pursuant to (b), below.

(b) Prior to the conclusion of the hearing, a participant may request that the record be left open for a specified period of time in which to file evidence or arguments not available at the hearing. If the council determines that such material is necessary to a full consideration of the issues raised in the appeal, the presiding officer shall set a date by which the additional material shall be filed.

(c) The participant filing such additional material shall serve copies of all items filed in accordance with Env-WC 203.08.

(d) If any other participant to the hearing requests time to respond to the material submitted, the presiding officer shall set a specific time period following filing of the material for the filing of a response. If any other participant to the hearing requests the opportunity to cross-examine on the additional material submitted, the presiding officer shall set a date and time for a hearing at which cross-examination on the additional material submitted shall be allowed, if the presiding officer determines that such cross-examination is required for a full and true disclosure of the facts.

(e) The determination to allow cross-examination shall be based on:

- (1) The nature of the factual and legal issues in dispute in the proceeding;
- (2) The testimony and evidence submitted during the hearing and any cross-examination thereon; and
- (3) The nature of the additional evidence to be submitted.

Env-WC 204.11 Reopening of the Record.

(a) At any time prior to a final decision on the appeal, any participant in a proceeding or any member of the council may request the presiding officer to reopen the record to consider relevant, material, and non-duplicative testimony, evidence, arguments, or exhibits not previously considered.

(b) If the request is made after one or more participants have left the hearing, the request shall be in writing and a copy of the request shall be served in accordance with Env-WC 203.08.

(c) If the presiding officer determines that such testimony, evidence, arguments, or exhibits are necessary to a full consideration of the issues raised by the appeal, the record shall be reopened to accept the offered items.

(d) The presiding officer shall give written notice of the acceptance into the record of the offered items to all participants if the participants are no longer present. The presiding officer shall also set a time within which other participants may respond to or rebut the items made part of the record.

Env-WC 204.12 Failure to Appear. If any participant to whom notice of a hearing has been given in accordance with these rules fails to appear and fails to advise the appeals clerk of such non-appearance in advance of the hearing, and the council determines that delaying the hearing to a later date would cause undue inconvenience or prejudice to the participant(s) present, the council shall hear the evidence and

testimony of the participant(s) present and shall render a decision thereon, subject to Env-WC 204.13.

Env-WC 204.13 Reconvening of Hearings.

(a) If a hearing is held in a participant's absence pursuant to Env-WC 204.12, the participant may file a motion to reconvene the hearing within 10 days after the date of the hearing.

(b) The motion shall:

- (1) State the reason(s) why the participant was absent from the hearing;
- (2) State why the appeals clerk was not notified of the absence in advance of the hearing;  
and
- (3) Be supported by affidavits or other evidence.

(c) If the council determines that good cause exists to explain the participant's failure to appear at the hearing and to explain the participant's failure to notify the appeals clerk in advance of the hearing, the council shall reconvene the hearing by scheduling another hearing. Good cause shall mean accident, sudden illness, death of a family member or other circumstance beyond the control of the participant which prevents the participant from attending the hearing and from notifying the appeals clerk.

Env-WC 204.14 Burden and Standard of Proof.

(a) In any appeal of a department decision, the decision being appealed shall be presumed to be lawful and reasonable. The appellant shall bear the burden of proving, by a preponderance of the evidence, that the decision that is being appealed was:

- (1) Contrary to statute or rules; or
- (2) Arbitrary and capricious.

(b) For motions, waiver requests, and other non-dispositive matters, the participant asserting the truth of a statement shall bear the burden of proving, by a preponderance of the evidence, that the statement is true.

(c) For purposes of this section, proof by a preponderance of the evidence means that what is sought to be proved is more probable than not.

(d) Without limiting (a) or (b), above, the participant filing a motion shall have the burden of persuading the council that the motion should be granted.

Env-WC 204.15 Decisions.

(a) A decision shall be made by a majority of the quorum that heard the appeal, with all council members who are necessary to constitute a quorum voting.

(b) Unless the appeal is withdrawn pursuant to Env-WC 203.14, the council shall issue a final decision in writing. The final decision shall include findings of fact and conclusions of law separately stated. Findings of fact shall include a concise and explicit statement of the underlying facts supporting

the findings.

(c) If a participant has submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding, except that no ruling shall be necessary on any compound request.

(d) The appeals clerk shall serve a copy of the council's decision on each participant in accordance with Env-WC 203.08.

(e) The appeals clerk shall keep a copy of each decision on file in the council's public records for at least 5 years following the date of the final decision or the date of the decision on any appeal, unless the director of the division of archives and records management of the department of state sets a longer retention period pursuant to rules adopted under RSA 5:40.

Env-WC 204.16 Motion for Rehearing.

(a) Any participant whose rights are directly and adversely affected by a decision of the council may file with the council a motion for rehearing within the time period established in RSA 541:3. Copies of the motion shall be served in accordance with Env-WC 203.08.

(b) A motion for rehearing shall set forth in detail the following:

- (1) The basis of the moving participant's aggrievement;
- (2) The finding(s), conclusion(s), or condition(s) to which the moving participant objects;
- (3) The basis for the objection(s);
- (4) Whether the moving participant seeks to present new or additional evidence, and if so, the nature of such evidence to be offered; and
- (5) The nature of the relief requested.

(c) The council shall, at its first scheduled meeting following the receipt of such a motion, order a hearing or dismiss the motion. Any hearing held under this section shall be limited to the issues raised in the motion for rehearing. The council shall provide reasonable notice to all participants of the rehearing.

(d) If a rehearing is granted, the moving participant may offer new or additional evidence to:

- (1) Cure any deficiencies in the original notice of appeal or testimony;
- (2) Correct errors of form in the decision;
- (3) Request reconsideration of the conditions of the approval or of the denial; or
- (4) Challenge any facts of which official notice was taken.

(e) A council decision shall become final if no motion for rehearing is filed within the period specified in (a), above.

## PART Env-WC 205 RULEMAKING PETITIONS AND HEARINGS

Env-WC 205.01 Filing. Any person wishing to petition the council to amend, adopt, or repeal a council rule shall file the original and one copy of the petition with the council clerk as provided in Env-WC 202.06(a).

Env-WC 205.02 Form and Content of Petition.

(a) A petition to adopt, amend, or repeal a council rule shall be in writing and shall be signed by the person who is seeking the ruling.

(b) A rulemaking petition shall include the following:

(1) The name, mailing address, and daytime telephone number of each person filing the petition and, if available, a fax number and e-mail address for each such person;

(2) Whether the person is asking the council to adopt, amend, or repeal a rule;

(3) If the petition is to adopt a rule:

a. The chapter, part, and section, by alphanumeric code, where the person proposes the rule to be inserted; and

b. The language that the person wants to have adopted as a rule;

(4) If the petition is to amend a rule:

a. The specific rule, by alphanumeric code, that is the subject of the petition; and

b. The language that the person wants to have adopted as a rule;

(5) If the petition is to repeal a rule, the specific rule, by alphanumeric code, that is the subject of the petition; and

(6) A clear and concise statement of why the petitioner wants the council to undertake the action requested.

(c) A petition to adopt, amend, or repeal a council rule may also include such other information as the person filing the petition deems pertinent and relevant, and the person may attach exhibits, illustrations and sworn written information to the petition.

Env-WC 205.03 Processing of Rulemaking Petitions.

(a) Upon receipt of a petition to adopt, amend, or repeal a council rule, the council clerk shall forward the petition to the council.

(b) At its first meeting following receipt of a petition to adopt, amend, or repeal a council rule, the council shall review the petition and proceed in accordance with RSA 541-A:4, I.

(c) The petition shall be granted and a rulemaking proceeding shall be initiated if the council determines that the proposed action is:

- (1) Consistent with state and federal law and policy; and
- (2) Necessary to secure the just, efficient, and accurate resolution of council proceedings in accordance with recognized principles of due process and the requirements of RSA 541-A.

Env-WC 205.04 Public Comment on Proposed Council Rules. The council shall provide notice of and receive public comment on proposed council rules as follows:

- (a) The council shall give notice of the proposed rulemaking in accordance with RSA 541-A:6;
- (b) Any person wishing to submit written comments shall file the comments as specified in the notice of proposed rulemaking;
- (c) A public hearing shall be held during a meeting of the council and shall be identified on the agenda for the meeting as a hearing to receive public comment on the proposed council rules;
- (d) The presiding officer shall open the public hearing and ask any person wishing to comment on the proposed council rules to identify himself or herself for the record and to proceed with his/her comments;
- (e) All comments shall be recorded in full by tape recording or other method which will provide a verbatim record of the hearing;
- (f) After all persons who wished to comment have done so, the presiding officer shall close the public hearing on the proposed council rules;
- (g) For rulemaking hearings, the record shall remain open until the date specified in the notice provided pursuant to (a), above; and
- (h) Hearings on proposed rules shall be continued or postponed only in accordance with RSA 541-A:11, III or IV, respectively.

#### PART Env-WC 206 DECLARATORY RULINGS

##### Env-WC 206.01 Filing.

- (a) Any person seeking a declaratory ruling from the council as to the meaning or applicability of a rule in this chapter shall file the original and one copy of a petition for declaratory ruling with the council clerk at the address identified in Env-WC 202.06(a).
- (b) A request for declaratory ruling shall not be filed as a substitute for an appeal of a department decision or request for reconsideration of a council decision.

##### Env-WC 206.02 Form and Content of Petition.

- (a) A petition for a declaratory ruling shall be in writing and shall be signed by the person who is seeking the ruling.
- (b) A petition for a declaratory ruling shall include the following:
  - (1) The name, mailing address, and daytime telephone number of each person requesting

the declaratory ruling and, if available, a fax number and e-mail address for each person;

(2) A precise and complete citation to the administrative rule for which the petitioner seeks a ruling; and

(3) A clear and concise statement explaining the background, facts, and considerations which led to the petition in order for the council to understand the nature and specific reasons for the petition and why the ruling is being requested.

(c) A petition for a declaratory ruling may also include such other information as the person filing the petition deems pertinent and relevant, and the person may attach exhibits, illustrations and sworn written information to the petition.

Env-WC 206.03 Processing of Petitions for Declaratory Rulings.

(a) Upon receipt of a petition for a declaratory ruling, the council clerk shall forward the petition to the council.

(b) At its first meeting following receipt of a petition for declaratory ruling, the council shall review the petition to determine:

(1) Whether additional information or explanation is needed; and

(2) Whether the complexity of the petition, including but not limited to the issue in question and the legal implications thereof, will cause the council to seek assistance from the department of justice.

(c) The council shall inform the petitioner in writing of the results of its review under (b), above. If additional information or explanation is needed, the council shall identify the needed information or explanation and shall establish a deadline for the petitioner to provide the information, which shall be no sooner than 20 days after the date of the notice. If the council will be seeking assistance from the department of justice, the council shall inform the petitioner of the anticipated amount of time that will be needed to obtain such assistance.

(d) If assistance from the department of justice is not required, the council shall issue a written response to the person filing the petition for declaratory ruling within 30 days after the first council meeting following receipt of a complete petition.

(e) If assistance from the department of justice is required, the council shall issue a written response to the person filing the petition for declaratory ruling within 30 days after the first council meeting following receipt of assistance from the department of justice.

(f) Declaratory rulings issued by the council shall be filed with the director of legislative services in accordance with RSA 541-A:16, II(b).

PART Env-WC 207 EXPLANATION OF RULES

Env-WC 207.01 Explanation of Rules.

(a) As specified in RSA 541-A:11, VII, any interested person may, at any time before 30 days after final adoption of a rule by the council, request the council to issue an explanation of the rule that it has adopted.



- (b) The request shall be:
- (1) In writing; and
  - (2) Filed in accordance with Env-WC 202.06(a).
- (c) As specified in RSA 541-A:11, VII, the explanation shall include:
- (1) A concise statement of the principal reasons for and against the adoption of the rule in its final form; and
  - (2) An explanation of why the council overruled the arguments and considerations against the rule.
- (d) The explanation shall be issued within 30 days following the first council meeting after receipt of the request.

#### APPENDIX

<b>Rule Section(s)</b>	<b>Statutory Section(s) Implemented</b>
Env-WC 201	RSA 21-O:7; RSA 21-O:14; RSA 541-A:16, I; RSA 541-A:30-a; RSA 541-A:31-36
Env-WC 202 (also see sections implementing specific statutes as listed below)	RSA 21-O:7; RSA 21-O:14; RSA 541-A:16, I; RSA 541-A:30-a; RSA 541-A:31-36
Env-WC 202.05	RSA 541-A:30-a, III(f)
Env-WC 202.06, 202.09	RSA 541-A:30-a, III(a)
Env-WC 202.10	RSA 541-A:30-a, III(b); RSA 541-A:36
Env-WC 202.13	RSA 541-A:30-a, III(j)
Env-WC 203 (also see sections implementing specific statutes as listed below)	RSA 21-O:7; RSA 21-O:14; RSA 541-A:16, I; RSA 541-A:30-a; RSA 541-A:31, 35, 36
Env-WC 203.01, 203.05 - 203.07	RSA 541-A:30-a, III(b)
Env-WC 203.12	RSA 541-A:30-a, III(h)
Env-WC 203.13	RSA 541-A:30-a, III(b)
Env-WC 203.15	RSA 541-A:30-a, III(j)
Env-WC 203.16	RSA 541-A:30-a, III(k)
Env-WC 203.17	RSA 541-A:30-a, III(g)
Env-WC 204 (also see sections implementing specific statutes as listed below)	RSA 21-O:7; RSA 21-O:14; RSA 541-A:16, I; RSA 541-A:30-a; RSA 541-A:31 - 36
Env-WC 204.03	RSA 541-A:30-a, III(c)
Env-WC 204.14	RSA 541-A:30-a, III(d), (e)
Env-WC 204.11	RSA 541-A:30-a, III(i)
Env-WC 204.15(e)	RSA 541-A:30-a, III(l)
Env-WC 205	RSA 541-A:16, I(c)
Env-WC 206	RSA 541-A:16, I(d)
Env-WC 207	RSA 541-A:11, VII